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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JAIME ANTONIO TORRES, Appellant.	)	2 CA-CR 2010-0283 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20084880

Honorable Richard S. Fields, Judge
Honorable John S. Leonardo, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 Appellant Jaime Torres appeals his convictions and sentences for conspiracy to commit possession of marijuana for sale, possession of marijuana for sale, and possession of drug paraphernalia. He argues the trial court erred in 1) denying his

motion to suppress evidence obtained through the camera surveillance of his residence, 2) denying his motion to dismiss on double jeopardy and prosecutorial misconduct grounds after a mistrial was granted during his first trial, 3) allowing a detective to present expert testimony on drug trafficking, 4) permitting a detective to state his opinion about the identity of people and objects in the surveillance videotape, and 5) denying his motion for mistrial based on that testimony. Finding no error, we affirm.

Background

¶2 We view the facts and all reasonable inferences in the light most favorable to upholding the convictions. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). In 2008, as part of a surveillance operation, law enforcement officers set up a video camera to observe Torres's residence. While monitoring the camera remotely, Pima County Sheriff's Department Detective Robert Fiore observed a Nissan Versa arrive at the residence and park next to a Nissan Sentra and a Chevrolet Cavalier. Shortly thereafter, the Versa backed up to the doorway of the residence, and Fiore observed Torres and another individual load objects wrapped in cellophane and an item that appeared to be a blanket into the vehicle's hatchback compartment. After the Versa left, the Sentra and Cavalier followed. Torres was riding in the front passenger seat of the Sentra when it left the property. Because Fiore believed the objects wrapped in cellophane were bales of marijuana, he advised officers to stop the vehicles.

¶3 After officers stopped the Sentra and the Versa, they found several bales of marijuana covered by a blanket in the back of the Versa. They also found five thousand

dollars in an envelope in the Sentra. During a search of Torres's residence, officers located firearms, marijuana, a digital scale, and packing materials.

¶4 Torres was charged with conspiracy to commit possession of marijuana for sale, possession of marijuana for sale, possession of drug paraphernalia, sale of marijuana, possession of a deadly weapon by a prohibited possessor, possession of a deadly weapon during the commission of a felony drug offense, and money laundering. After Torres's first trial ended in a mistrial, a second jury found him guilty as outlined above. The trial court imposed concurrent, presumptive, enhanced sentences totaling 9.25 years. This appeal followed.

Discussion

Motion to suppress surveillance evidence

¶5 Torres argues "[t]he trial court erred by denying [his] motion to suppress evidence gathered by the surveillance of his home." He maintains the "continual video surveillance of [his] home over a three-month period," which led to the discovery of the evidence, "violat[ed] . . . the Fourth Amendment to the United States Constitution." "In reviewing a denial of a motion to suppress, we review only the evidence submitted at the suppression hearing and we view the facts in the light most favorable to upholding the trial court's ruling." *State v. Box*, 205 Ariz. 492, 493, 73 P.3d 623, 624 (App. 2003) (citation omitted). "We review the court's decision 'for abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues de novo.'" *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007), *quoting State v. Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App. 2006).

¶6 At the suppression hearing, Tucson Police Department Detective Lonnie Bynum testified that in 2008 police had begun surveillance of Torres's residence, based on "information that drugs had been recently seen at that address." Torres's residence was located on approximately five acres of land, set back from the main roadway and accessed by a gated driveway that connected to the rear of the residence. An elevated concrete parking area near the back door provided access to the residence. A six-foot-high wall was located on the west side of the back yard, and the rest of the yard was "at least partially enclose[d]" with chain link fencing. The yard abutted public land that included "hills and mountains" from which the back yard area and rear driveway were visible.

¶7 Without obtaining a search warrant, officers attached the surveillance camera to a utility pole next to a publically accessible road that, although unmaintained, was "open to the public." The pole was approximately 125 to 150 yards southwest of the residence and the ground below it was elevated above Torres's residence; the camera was approximately twelve to fifteen feet above the ground,[1] had a lens that permitted magnification, and was positioned towards "the back parking area of the residence."[2] It operated continuously over the course of approximately three months.

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[1]Bynum testified that from ground level on the road he "could clearly see the back of [Torres's] residence, the driveway where the vehicles were parked [and] the back door." But, Torres claimed it was not possible to see the area from ground level due to vegetation and "buildings in the way." We view the evidence in the light most favorable to upholding the trial court's ruling. *Box,* 205 Ariz. at 493, 73 P.3d at 624.

[2]Torres asserts without support that "the camera also afforded . . . a view of the interior of the house, at least at night when the lights were on and curtains open." But, as

¶8 Following the hearing, the trial court denied the motion to suppress, finding Torres "did not have a reasonable expectation of privacy" as the yard was "clearly visible from both public lands and the private property of nearby residents." The court also found "[n]o physical intrusion onto private property occurred" and "[t]he area in question clearly exceeds any notions of 'curtilage.'"

¶9 The Fourth Amendment prohibits unreasonable searches or seizures. *Katz v. United States*, 389 U.S. 347, 357 (1967). "[A]s a general rule, a warrant is required when the suspect has a reasonable expectation of privacy in the place or the item searched." *State v. Blakley*, 226 Ariz. 25, ¶ 6, 243 P.3d 628, 630 (App. 2010). Torres argues the back yard area was "part of the 'curtilage' of the home and [thus] within the protection of the Fourth Amendment to the same extent as the home itself." *See State v. Olm*, 223 Ariz. 429, ¶¶ 5-10, 224 P.3d 245, 247-49 (App. 2010) (protection of Fourth Amendment extends to curtilage, the area that is "'intimately tied to the home itself'"), *quoting United States v. Dunn*, 480 U.S. 294, 301 (1987). He contends the trial court erred in finding "the area under surveillance was not the curtilage" and argues "visual intrusion into this area was tantamount to intrusion into the home itself." But, even assuming the back yard area is curtilage, this does not resolve the issue presented as "the home and its curtilage are not necessarily protected from inspection that involves no physical invasion." *Florida v. Riley*, 488 U.S. 445, 449 (1989); *California v. Ciraolo*,

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he acknowledges, the testimony at the hearing established that although there were "a couple of windows visible within the view of the camera" officers "could not see anything going on inside the residence itself." This was especially so at night because the "lights from inside the house [would] blind . . . the camera."

476 U.S. 207, 213 (1986) ("That the area is within the curtilage does not itself bar all police observation."). Because officers observed activities remotely and did not physically intrude on the property during their surveillance, we first must decide whether Torres had a reasonable expectation of privacy in the area viewed by the camera. *See Blakley*, 226 Ariz. 25, ¶ 6, 243 P.3d at 630.

¶10 Torres testified the area was "just for family use," and he considered it "[v]ery private."[3] But, "an individual's subjective expectation of privacy alone is not enough to give rise to Fourth Amendment protection." *State v. Duran*, 183 Ariz. 167, 169, 901 P.2d 1197, 1199 (App. 1995). Torres also must demonstrate his expectation is objectively reasonable in that it is "one that society is prepared to recognize as 'reasonable.'" *Smith v. Maryland*, 442 U.S. 735, 735 (1979), *quoting Katz*, 389 U.S. at 361. Torres argues his expectation of privacy was reasonable under this standard because "[t]he back . . . of the property was not . . . in the view of the general public or . . . neighbors." But the evidence undercuts this claim. As established at the suppression hearing, public land near the residence provided an unobstructed view of the back yard. There were "numerous trails in that area" and, as the trial court found, "[a]ny hiker with a pair of cheap binoculars could have easily watched activities" in the back yard.

¶11 Nevertheless, Torres claims he had a reasonable expectation of privacy because he took some measures to make the area private, including "partially surround[ing it] by walls." But, "the mere fact that an individual has taken measures to

[3]Although Torres claims he believed this area to be private, he testified that the area was visible from the adjoining public land.

restrict some views of his activities [does not] preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible." *Ciraolo*, 476 U.S. at 213. And, as Bynum testified, the back door and rear driveway of Torres's residence were clearly visible from the publically accessible road along which the pole was located.[4]

¶12 Nor did the use of a camera, rather than in-person surveillance, violate Torres's Fourth Amendment rights. "[T]echnological enhancement of ordinary perception from . . . a vantage point" may present Fourth Amendment concerns in cases where sense-enhancing technologies are not in general use and permit observations "that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area.'" *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001), *quoting Silverman v. United States*, 365 U.S. 505, 512 (1961). But Torres has presented nothing to suggest that the technology used by police was not in general use. Rather, because the camera recorded activities on the property both with and without magnification, the views it afforded are similar to those a member of the public might see with or without binoculars.

¶13 Torres further claims that even if the area where the pole was located is accessible to the public, this "does not foreclose a reasonable expectation of privacy" because "[t]he severity of the governmental intrusion affects the legitimacy of a[n] . . .

[4]For this reason, we also reject Torres's assertion that *State v. Olm*, 223 Ariz. 429, 224 P.3d 245 (App. 2010) is applicable. In *Olm* we held the defendant's Fourth Amendment rights were violated based on an officer's physical entry into the curtilage of the home. *Id*. ¶ 17. Our decision was not based on the viewing of evidence from outside the curtilage. *Id*. Indeed, we noted that even if an area is curtilage, no Fourth Amendment violation occurs "when the officer observes contraband in plain sight from a lawful vantage point." *Id*. ¶ 13.

expectation of privacy." He contends that here, the intrusion was "pervasive and constant" because the camera operated continuously over several months. In support of this argument, he relies primarily on *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987) and *United States v. Nerber*, 222 F.3d 597 (9th Cir. 2000).

¶14 In *Cuevas-Sanchez,* officers installed a video camera on a utility pole that allowed them to see over the defendant's ten-foot-high back yard fence. 821 F.2d at 250. The court distinguished the Supreme Court's holding in *Ciraolo* that a warrant is not required for officers "traveling in the public airways . . . to observe what is visible to the naked eye," *id*., *quoting Ciraolo*, 476 U.S. at 215, reasoning that the video surveillance, was "not a one-time overhead flight or a glance over the fence by a passer-by." *Id.* at 251. In concluding that "Cuevas's expectation to be free of this type of . . . surveillance in his backyard is one that society is willing to recognize as reasonable" the court noted that Cuevas-Sanchez had "erected fences around his backyard, screening the activity within from [the] view[] of casual observers." *Id*.

¶15 Here, unlike the situation in *Cuevas-Sanchez*, Torres's back yard was open to public view from several locations and was visible from ground level in the area where the camera was placed. *Id*. And, although the camera was elevated, such positioning was not necessary to observe activities in the back yard. *See State v. Holden*, 964 P.2d 318, 321-22 (Utah Ct. App. 1998) (distinguishing *Cuevas-Sanchez* from case involving video surveillance of areas open to public view). And unlike Cuevas-Sanchez, Torres had not erected a ten-foot fence to screen his property from public view to establish a reasonable expectation of privacy. Indeed Torres testified he knew the area was open to public view.

"What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Ciraolo*, 476 U.S. at 213, *quoting Katz*, 389 U.S. at 351.

¶16 We likewise find Torres's reliance on *Nerber* misplaced. There, the court found the defendants had a reasonable expectation to be free from video surveillance within a private hotel room. *Nerber*, 222 F.3d at 598-600. But, here the camera recorded activity in an area over which Torres had no reasonable expectation of privacy. *See Olm*, 223 Ariz. 429, ¶ 5, 224 P.3d at 247; *see also Ciraolo*, 476 U.S. at 214-15 (defendant not "'entitled to assume' his unlawful conduct will not be observed . . . by a power company repair mechanic on a pole overlooking the yard"). Therefore, Torres has not demonstrated that his Fourth Amendment rights were violated by the camera surveillance,[5] and the trial court did not abuse its discretion in denying Torres's motion to suppress the surveillance videotape.[6]

[5]Torres also argues the surveillance violated article II, § 8 of the Arizona Constitution. Contrary to the state's contention, Torres did preserve this argument for appeal, but we find it without merit. The only additional protection recognized by our supreme court beyond that afforded by the Fourth Amendment involves unlawful physical entry into the home. *See State v. Bolt*, 142 Ariz. 260, 264-65, 689 P.2d 519, 523-24 (1984) (holding warrantless entry of home violated article II, § 8, and noting "Arizona's constitutional provisions generally were intended to incorporate the federal protections [but] are specific in preserving the sanctity of homes and in creating a right of privacy") (citation omitted). No such entry occurred here.

[6]Torres claims the officers lacked reasonable suspicion to conduct surveillance of his property. Torres did not raise this ground below, and we therefore review for fundamental error only. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Because Torres does not assert fundamental error on appeal, the argument is waived. *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

Double Jeopardy

¶17 Torres next claims "[t]he trial court erred by denying [his] motion to dismiss due to double jeopardy after the State's actions at his first jury trial resulted in a mistrial." On the second day of Torres's first trial, the prosecutor explained that although he had intended to present a digital video disc (DVD) recording of the surveillance videotape, technical problems had prevented him from doing so. The prosecutor indicated he would instead present a video home system (VHS) recording. Torres objected on the basis the VHS recording had not been disclosed, provided a better quality image than the DVD version, and contained material not present in the DVD. After viewing both the DVD and VHS recordings the court found the VHS was "qualitatively better" than the DVD and precluded the state from using it.

¶18 The state then asserted that if Torres cross-examined Fiore as to the quality of the DVD, it would open the door for the state to seek admission of the VHS recording. The trial court reaffirmed its ruling that the state was "restricted to using the [DVD]." The prosecutor expressed concern about how to handle Fiore's potential answers to questions regarding the quality of the DVD. Counsel for Torres's codefendant, who had also objected to the VHS recording, then stated:

> [I]f the State thinks it's untenable to move forward . . . I'll move for a mistrial. I don't know if they're going to object to it. I'll move for a mistrial at that time. They don't have to. It saves them the double jeopardy issue.
>
> Quite frankly, I think that puts my client back in the position he desired to be all along. And so, I'll make that motion to the Court. I don't know what the State's position is

> going to be. At least then they can re-disclose it for the second trial if that's what they decide they want to do.

Torres joined the motion for mistrial, stating:

> I have to join that motion, Judge, even though it's reluctantly, because, we're not going to be able to effectively cross-examine Detective Fiore. And based on the fact that the DVDs, the images do not show what he says he believes he sees, then we're hamstrung. We have no effective right of confronting this evidence.
>
> And [the prosecutor] is right in a way. If . . . [the witness is] permitted to answer, then, again, the damage is done to our case.

After the court had granted the motion for mistrial, Torres filed a motion to dismiss in which he argued the "mistrial result[ed] from the misconduct of the State" and retrial "would violate his rights against double jeopardy." The court denied the motion finding "[t]here was no disclosure violation; there was no prosecutorial misconduct. And, . . . [the] ruling was to . . . ensure . . . the defense had a fair trial."

¶19 On appeal, Torres claims the trial court erred in denying the motion to dismiss. We review a trial court's decision whether to dismiss an indictment on double jeopardy grounds for abuse of discretion. *Miller v. Superior Court*, 189 Ariz. 127, 129, 938 P.2d 1128, 1130 (App. 1997); *State v. Covington*, 136 Ariz. 393, 396, 666 P.2d 493, 496 (App. 1983). The Double Jeopardy Clause protects a criminal defendant's "right to be free from multiple trials." *State v. Jorgenson*, 198 Ariz. 390, ¶ 6, 10 P.3d 1177, 1178 (2000). Although a "defendant ordinarily waives that right when he seeks a new trial because of error in the original trial, the clause applies when the need for a second trial is brought about by the state's egregiously intentional, improper conduct." *Id.*

Prosecutorial misconduct sufficient to implicate double jeopardy "[can] not merely [be] the result of legal error, negligence, mistake, or insignificant impropriety," however, and must instead amount to "intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose." *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984).

¶20 Torres claims the prosecutor committed misconduct by "disclos[ing] inferior DVD copies of the surveillance video, [and] never indicating that a much clearer version existed or that [he] intended to use the version at trial." But the state disclosed the existence of the VHS recording and, from the record, it appears neither the prosecutor nor defense counsel were aware of a qualitative difference in the recordings until technical difficulties prevented playing the DVD. As the trial court noted "[counsel] simply hadn't looked at the quality issue." We therefore cannot say the prosecutor engaged in "intentional conduct which [he knew] to be improper and prejudicial." *Id.*

¶21 Torres also claims that "[i]nstead of accepting the court's ruling" that the VHS recording could not be used, the prosecutor insisted on using the evidence by stating that if Torres cross-examined Fiore about the tape "the State would argue that the door had been opened and the tape should be introduced." He further asserts "the trial court . . . never told the prosecutor he could not do what he was proposing to do." Torres concludes he had "no other option" but to move for a mistrial."[7]

[7]Although Torres claims the "grant of the mistrial . . . was tantamount to a sua sponte ruling by the trial court and should be evaluated under [a different] standard," he concedes the court granted the mistrial at his request. He argues he made the request "only because the state forced his hand and the court gave him no other option," but this

¶22 Torres's argument is not supported by the record. Contrary to his claim, the prosecutor did not insist on the use of the evidence following the trial court's ruling, but only stated his belief that it might become admissible should defense counsel open the door. The court disagreed and twice affirmed its ruling that the evidence was not admissible, explaining "[t]he State is going to be restricted to the exhibits that were disclosed. It's that simple." The prosecutor did not continue to seek admission of the tapes, but instead expressed concern with Fiore's potential answers and explained he was "trying to figure out how to prevent a mistrial." Further, counsel for Torres's codefendent acknowledged in the motion for mistrial in which Torres joined that granting the motion would avoid "the double jeopardy issue" and the state could "re-disclose [the evidence] for the second trial."

¶23 Torres has not demonstrated that the prosecutor's actions placed him in an untenable position or that the state engaged in "egregiously intentional, improper conduct" implicating the double jeopardy clause. *Jorgenson*, 198 Ariz. 390, ¶ 6, 10 P.3d at 1178. We therefore conclude the trial court did not err in denying Torres's motion to dismiss.

Drug trafficking testimony

¶24 Torres contends the trial court erred "by allowing police officers to testify . . . as to the 'usual practices of drug dealers'" during his second trial. Torres filed a motion in limine in which he argued that any testimony by officers "about how drug

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argument lacks merit. And, in any event, Torres has provided no authority that a grant of a mistrial at a defendant's request may be considered "tantamount to a sua sponte ruling" under these circumstances.

dealers move or conceal drugs" should be precluded as irrelevant, unfairly prejudicial, and improper opinion testimony. The court ruled that "officers may testify about the practices of drug traffickers, so long as they do not attempt to fit the defendant into a profile." Thereafter, over Torres's objection, the state asked Bynum questions regarding drug trafficking.

¶25 Torres maintains the trial court erred in allowing Bynum's testimony about drug trafficking because it was irrelevant, unfairly prejudicial, and conflicted with our supreme court's holding in *State v. Lee*, 191 Ariz. 542, 959 P.2d 799 (1998). We review the court's evidentiary rulings for abuse of discretion. *State v. Abdi*, 226 Ariz. 361, ¶ 21, 248 P.3d 209, 214 (App. 2011). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. Torres was charged with conspiracy to commit possession of marijuana for sale and sale of marijuana. As the prosecutor correctly explained, Bynum's testimony was relevant to modus operandi in a conspiracy and sale case and "would aid the trier of fact in understanding . . . something that's beyond the realm of [ordinary] experience."

¶26 Rule 403, Ariz. R. Evid., provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Relying on *Lee*, Torres claims Bynum's testimony was unfairly prejudicial as it "impl[ied] that he fit [into] a

'profile' and was a 'typical drug dealer.'"[8] In *Lee*, an officer's testimony regarding the typical profile of a drug courier was compared to the defendant to prove that he had known that the suitcase he carried contained marijuana. 191 Ariz. 542, ¶¶ 13-18, 959 P.2d at 802-03. The court found "the use of drug courier profile evidence as substantive proof of guilt" improper and concluded the "evidence . . . should not have been admitted . . . since its only purpose was to suggest that because the accuseds' behavior was consistent with that of known drug couriers, they likewise must have been couriers." *Id.* ¶¶ 12, 18.

¶27 Torres argues that here, as in *Lee*, "[t]he only purpose for which the evidence could have been presented was to fit [him] into a profile and suggest that he was therefore guilty." We disagree. As the court noted in *Lee*, "there may be situations in which drug courier profile evidence has significance beyond the mere suggestion that because an accused's conduct is similar to that of other proven violators, he too must be guilty." *Id.* ¶ 19. One such situation is the "use of drug courier profile testimony 'to assist the jury in understanding modus operandi in a complex criminal case.'" *Id.* ¶ 11,

[8]Torres also appears to argue that the trial court should have excluded the evidence under Rule 404(a) and (b), Ariz. R. Evid. Neither rule is applicable here. Rule 404(a) applies to "[e]vidence of a person's character." Bynum did not testify about Torres's character. Rather, he explained generally how marijuana is transported, packaged and sold. Rule 404(b) likewise is inapplicable as Bynum did not testify as to Torres's "other crimes, wrongs or acts."

quoting United States v. Cordoba, 104 F.3d 225, 230 (9th Cir. 1996). The testimony here was offered for just that purpose.[9]

¶28 Torres next challenges the foundation for Bynum's testimony under Rule 702, Ariz. R. Evid., and *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).[10] "We will not disturb a trial court's ruling on the foundation for expert testimony absent a clear abuse of discretion." *State v. Roscoe*, 184 Ariz. 484, 493, 910 P.2d 635, 644 (1996). Rule 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[11] Bynum testified at length regarding his

[9]Bynum testified about the purpose of the symbols on bales of marijuana, the use of weapons to protect the bales, and that drug trafficking is a "cash and carry business." He also testified about the process by which the marijuana is unwrapped and weighed once it reaches a "stash house."

[10]Torres further argues the testimony "was insufficient under A.R.S. § 12-2203." Torres acknowledges that we recently found § 12-2203 unconstitutional, but urges us to reconsider our decision. *See Lear v. Fields*, 226 Ariz. 226, ¶ 1, 245 P.3d 911, 913 (App. 2011) (finding § 12–2203 unconstitutionally usurps supreme court's rule-making authority and violates separation of powers doctrine). But § 12-2203 was not in effect when Torres committed the offenses or when the jury returned its verdicts. *See* 2010 Ariz. Sess. Laws, ch. 302, § 1. "No statute is retroactive unless expressly declared therein." A.R.S. § 1-244. And, "[u]nless a statute is expressly declared to be retroactive, it will not govern events that occurred before its effective date." *State v. Coconino Cnty. Superior Court*, 139 Ariz. 422, 427, 678 P.2d 1386, 1391 (1984). Nothing in § 12-2203 indicates a legislative intent that the statute have retroactive effect. We therefore conclude § 12-2203 is inapplicable and decline to revisit our decision in *Lear*.

[11]Our supreme court recently amended Rule 702 to "adopt[] Federal Rule of Evidence 702, as restyled." Ariz. R. Evid. 702 2012 court cmt. That amendment does not impact our decision in this matter because, as discussed below, the expert testimony

qualifications and specialized knowledge gained through thirty-one years of law enforcement experience including supervision of investigations involving the importation, transportation, and sale of large amounts of marijuana and work as an undercover narcotics officer. Bynum's testimony established that he had specialized knowledge and that this knowledge would assist the jury in understanding the evidence.[12] *See* Ariz. R. Evid. 702.

¶29 Torres also claims Bynum's testimony was inadmissible because it did not comply with the requirements of *Frye*. Torres did not raise this argument below, and we therefore review for fundamental error only. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). We find no error, fundamental or otherwise. Bynum's testimony was based on his personal experience and observations. And, *Frye* is "inapplicable when a witness reaches a conclusion by inductive reasoning based on his or her own experience, observation, or research." *Logerquist v. McVey*, 196 Ariz. 470, ¶ 62, 1 P.3d 113, 133 (2000). Accordingly, the trial court did not abuse its discretion in admitting the testimony.

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here was based on experience, and the amendment was not "intended to . . . preclude the testimony of experience-based experts." *Id*.

[12]Although Torres challenges the extent of Bynum's qualifications, Rule 702 requires only that the expert have "knowledge superior to people in general through actual experience or careful study." *State v. Superior Court*, 152 Ariz. 327, 330, 732 P.2d 218, 221 (App. 1986). The degree of the expert's qualification goes to the weight of the testimony rather than its admissibility. *State v. Davolt*, 207 Ariz. 191, ¶ 70, 84 P.3d 456, 475 (2004).

Observations testimony

¶30 Torres next asserts the trial court "abused its discretion by allowing police officers to testify, over objection, to what objects seen on the [surveillance] video were and to characterize those aspects of the video." Torres filed a motion in limine in which he asked the court to preclude any testimony by officers identifying the objects in the surveillance video. He argued such testimony "would be . . . speculation . . . improper opinion and . . . unfairly . . . prejudicial." The court ruled that the officers would not be permitted to "testify/identify objects in the video as it is being shown to the jury. [But] [s]hortly thereafter, the officers can testify as to photographs or the actual objects . . . that were seized and explain to the jury what they are."

¶31 During trial, the state argued that the testimony should be permitted under Rules 702 and 703, Ariz. R. Evid., and asked the court to reconsider its ruling. The court ruled that after the state played the tape, officers could testify as to their observations and impressions based on the videotape, but only in the context of explaining why they had provided a "reason . . . for continuing their investigation." The state then called Fiore who identified the people and objects in the videotape.[13] Fiore explained he had notified officers to stop the vehicles because he believed he had seen people loading bales of marijuana into the Versa.

¶32 Torres claims "[a]llowing [Fiore] to identify people and objects in the video, even if expressed as an opinion, lacked foundation and was not proper opinion

[13]Fiore testified he had seen the people in the videotape in "real life" on the date of the offense, had looked at them closely, and had observed their clothing.

evidence under Ariz. R. Evid. . . . 701 and 702."[14] He also argues "[t]he jury was in a position equal to [Fiore] to determine what they were seeing" in the video. We conclude the state provided ample foundation to admit Fiore's testimony under Rule 702. Fiore testified he had worked in law enforcement for over nineteen years, and had experience as a narcotics detective, primarily in conducting surveillance. He controlled the camera and monitored the video feed at the time the events about which he testified had occurred. Contrary to Torres's suggestion, Fiore's broad experience in law enforcement and his perspective as the camera operator gave him knowledge of events "superior to people in general." *State v. Superior Court*, 152 Ariz. at 330, 732 P.2d at 221.

Motion for mistrial

¶33 At trial, Torres objected specifically to two parts of Fiore's testimony. Referring to the part of the videotape that showed objects being loaded into the Versa, the prosecutor asked "do you have an opinion about what is occurring here as it relates to how you informed other officers?" Fiore answered, "I advised surveillance that they were loading bales in the Versa, to standby, looked like they were getting ready to go." Torres made an objection "based on the pretrial ruling," which was overruled. Referring to the same part of the video, the prosecutor asked "[n]ow you said what's occurring right now . . . has significance to your investigation in terms of what you had instructed or advised other officers in the field, is that correct?" Fiore responded, "[y]eah, I advised to

[14]Although the trial court found Fiore's testimony admissible, the basis for its ruling is not clear from its minute entry. Torres has not provided the transcript of the proceeding on appeal. But, we will affirm the court's decision if it is legally correct for any reason. *See State v. Cañez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002). And, as discussed, we conclude the testimony was admissible under Rule 702.

stop that vehicle . . . [b]ecause I believed in my training and experience that those are bales of marijuana being loaded into that vehicle." Torres objected and moved to strike the response, and the court sustained the objection.

¶34 Torres later moved for a mistrial claiming Fiore's testimony had violated the court's order. The trial court denied the motion, and Torres asserts it erred in doing so. We review the denial of a motion for mistrial for abuse of discretion. *See State v. Hoskins*, 199 Ariz. 127, ¶ 52, 14 P.3d 997, 1012 (2000). "This deferential standard of review applies because the trial judge is in the best position to evaluate 'the atmosphere of the trial, the manner in which the objectionable statement was made, and the possible effect it had on the jury and the trial.'" *State v. Bible*, 175 Ariz. 549, 598, 858 P.2d 1152, 1201 (1993), *quoting State v. Koch*, 138 Ariz. 99, 101, 673 P.2d 297, 299 (1983). In determining whether to grant a motion for mistrial based on a witness's testimony, the trial court must consider "(1) whether the testimony called to the jurors' attention matters that they would not be justified in considering in reaching their verdict and (2) the probability under the circumstances of the case that the testimony influenced the jurors." *State v. Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d 831, 839 (2003).

¶35 We find no error, much less error requiring the grant of a mistrial. *See State v. Nordstrom*, 200 Ariz. 229, ¶ 68, 25 P.3d 717, 738 (2001). We agree with the trial court that the testimony was "consistent entirely with the . . . pretrial ruling . . . [t]he officer stated [w]hat he observed . . . he described what he perceived it to be and the

actions he took as a result of his perception."[15] The testimony did not "contraven[e] . . . the court's pre-trial order" as Torres claims and did not provide grounds for the court to grant his motion for mistrial.[16] *See Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d at 839. Accordingly, the court did not abuse its discretion in denying the motion.

Disposition

¶36 We affirm the convictions and sentences imposed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

[15]The trial court sustained Torres's objection to the second statement. Although this ruling appears to conflict with the court's later finding that the testimony was consistent with its pretrial ruling, it does not affect our analysis on the motion for mistrial.

[16]Although Torres argues on appeal that the trial court erred in denying his motion for mistrial because the statements were "irrelevant, [and] lacked foundation" he did not raise these grounds below. We therefore review for fundamental error only. *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Because Torres does not argue fundamental error on appeal, the issues are waived. *Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140.